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The Jones Act and Choice of Law

The American system for compensating its seamen for injuries is without peer in liberality and generosity and is surpassed only by the ease with which a foreign seaman is given access to American courts to partake in the bounty. It is no surprise, then, that foreign seamen from all over the world are flocking to American courts to pursue their remedies, shunning the less liberal national systems that prevail around the world. As a result, the body of case law governing the conditions under which an American court will adjudicate the claim of foreign seamen has burgeoned.

The abovementioned phenomenon can be attributed to the Jones Act.[1] This statute, by its terms, seems to be universal in application: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law. . . ."[2]

Naturally, these principles have not been pushed to their logical extremes. They are limited by familiar international law and conflict of law principles which also are an operative part of our governing legal matrix.[3] These principles operate under a different theoretical context in Jones Act cases than in general maritime cases. Whether a foreign seaman has a cause of action under the Jones Act is a matter of statutory construction. The leading case of *Lauritzen v. Larsen,*[4] however, holds that international law and conflicts of law are to be considered as part of the statutory scheme. Whether a United States court should apply United States nonstatutory maritime law to the claim of a foreign seaman is a classic choice of law issue. Nevertheless, the analysis that *Lauritzen v. Larsen* approved for Jones Act cases is largely the same analysis used to determine not only the choice of law but the convenient forum under the general maritime law.[5]

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[1]The Jones Act, 38 Stat. 1185 § 20 (1915), 46 U.S.C. § 688 (1970).

[2]*Id.*

[3]"[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ." The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[4]345 U.S. 571 (1953).

[5]*See* Romero v. International Terminal Operating Co., 358 U.S. 354, 382 (1959); Complaint of Ta Chi Navigation (Panama) Corp., 462 F. Supp. 260 (S.D.N.Y. 1978); Kearney v. Savannah Foods & Indus., Inc., 350 F. Supp. 85, 87 (S.D. Ga. 1972).

This article will consider the limitations on the applicability of the Jones Act to the claims of American and foreign seamen in the choice of law context. As will become apparent, the scope of the Jones Act has been greatly expanded since the Supreme Court first limited it in *Lauritzen v. Larsen.*

I. Application of the Jones Act to Foreign Seamen

As mentioned above, the Jones Act refers only to "[a]ny seaman," and makes no requirement of nationality. There is no constitutional impediment preventing Congress from passing a statute intended to cover everyone everywhere.[6] But it was held in the leading case of *Lauritzen v. Larsen* that Congress could not have intended such a universal application:

> Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships, and foreign seamen only in accordance with the usual doctrines and practices of maritime law.[7]

Thus, *Lauritzen* and other cases considering whether the Jones Act ought to be applied to foreign seamen are not, strictly speaking, jurisdiction cases but are merely statutory construction cases. In *Lauritzen,* Justice Jackson noted that the defendant appeared generally. *In personam* jurisdiction was complete, so that "[a] cause of action under our law was asserted here."[8] Nevertheless, courts remained confused,[9] and counsel may find in this distinction room for procedural maneuvering.[10]

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[6]*See* United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818); *compare* DeMateos v. Texaco, Inc., 562 F.2d 895, 900 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978): "Obviously, however, the due process clause of the Fifth Amendment places bounds upon congressional efforts to apply American rules of decision to transactions in which the United States has no sufficient interest."

[7]345 U.S. 571, 581 (1953).

[8]*Id.* at 574–75. *See* McArthur v. Southern Airways, Inc., 569 F.2d 276, 279 (9th Cir. 1978) (dissent).

[9]*See, e.g.,* Dassigienis v. Cosmos Carriers & Trading Corp., 442 F.2d 1016 (2d Cir. 1971); Mihalinos v. Liberian S.S. Trikula, 342 F. Supp. 1237, 1240 (S.D. Cal. 1972).

[10]Counsel should remember that there is no *res judicata* effect if a court, ignoring this distinction, dismisses a Jones Act claim of a foreign plaintiff on the basis of no subject matter jurisdiction. *See* 5 WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE 543 n.54 (1969). If counsel finds the action dismissed in this fashion, he will be informed that his array of American contacts is not enough to satisfy the particular judge who dismissed the suit and may still file an identical action with another federal judge who, it is hoped, will be more sympathetic to his cause.

Likewise, counsel might be able to buy some time if the defense files a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. A judge would be compelled to deny the motion on the authority of *Lauritzen v. Larsen* and the plaintiff would still be in court until defense counsel could file the proper motion. Merren v. A/S Borgestad, 518 F.2d 82 (5th Cir. 1975). *But see* Koupetoris v. Konkar Intrepid Corp., 402 F. Supp. 951 (S.D.N.Y. 1975), *aff'd,* 535 F.2d 1392 (2d Cir. 1976).

It is difficult to determine which motion defense counsel should make. A motion to dismiss for failure to state a cause of action under Rule 12(b)(6) is improper. *Lauritzen,* 345 U.S. at 575, makes it clear that a seaman need not allege sufficient American contacts to state a cause of

Lauritzen v. Larsen was the first case brought by a foreign seaman under the Jones Act to reach the Supreme Court, and today, more than twenty-five years later, it remains the chief beacon by which United States courts are guided.[11] The actual holding of *Lauritzen* is fairly narrow: a foreign seaman, working for a foreign shipowner under articles signed in New York, who is injured in a foreign port, cannot recover under the Jones Act. But in wide-ranging dicta, Justice Jackson, speaking for the court, attempted to sort out the difficult issues by setting forth a general methodology for deciding when the Jones Act could be made to apply to the claims of foreign seamen. The chief task in choosing which nation's law should govern a transaction involving foreign seamen, said Justice Jackson, would be to ascertain and give weight to "points of contact between the transaction and the states or governments whose competing laws are involved."[12] For this task, Justice Jackson called upon the teaching of international law principles.[13]

Justice Jackson found seven factors generally conceded to be influential in determining which law should govern a tort claim.[14] These seven factors have been cited over and over again,[15] and before each is explored, it is helpful to discuss the nature of these points of contact. For instance, the *Lauritzen* factors are not the only factors which courts are permitted to consider.[16]

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action. *See also* Romero v. International Terminal Co., 358 U.S. 354, 359 (1958). A claim that the Jones Act does not apply because of a lack of American contacts probably is an affirmative defense under Rule 8(c) and, therefore, not subject to a Rule 12 motion. *See also* Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 547-48 (1935). If *Alaska Packers* is correct, summary judgment is the proper way for a defendant to challenge a foreign seaman's standing to sue under the Jones Act. *See, e.g.*, Merren v. A/S Borgestad, *supra*. Because summary judgment involves examination of the merits beyond the pleadings, a foreign seaman is entitled to the full panoply of discovery devices by which he can search for the existence of contacts sufficient to establish a case under the Jones Act. *See* Lekkas v. Liberian M/V Caledonian, 443 F.2d 10 (4th Cir. 1971); Grammenos v. Lemos, 457 F.2d 1067 (2d Cir. 1972).

[11] *See, e.g.*, Tsakonites v. Transpacific Carriers Corp., 368 F.2d 426, 427 (2d Cir. 1966), *cert. denied*, 386 U.S. 1007 (1967); Rode v. Sedco, Inc., 394 F. Supp. 206 (E.D. Tex. 1975).

[12] 345 U.S. at 582.

[13] Perhaps in deference to the intensely nationalistic views of the era, Justice Jackson was careful to point out that these principles had "the force of law not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations." 345 U.S. at 581-82. Nevertheless, principles of international law were held to be of the utmost importance:

> But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong for a foreign country to apply its law to an American transaction.

Id. at 582.

[14] The seven *Lauritzen* factors, which will be considered in detail later, are (1) the place of the wrongful act; (2) the law of the flag; (3) allegiance of the defendant shipowner; (4) the place where the contract of employment was made; (5) the inaccessibility of a foreign forum; (6) the allegiance or domicile of the injured seaman; and (7) the law of the forum.

[15] Judge Goldberg has dubbed them "the seven immortal pillars." Hellenic Lines, Ltd. v. Rhoditis, 412 F.2d 919, 922 (5th Cir. 1969), *aff'd*, 398 U.S. 300 (1970).

[16] *See* Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 309 (1970) (base of defendant's operations was in New York). Of course, courts should not seize on just any contact to justify the

Other legitimate points of contact with the United States may be relied upon by courts to uphold the application of the Jones Act to foreign seamen.[17] Nor are the various factors to be mechanically applied. A court should not merely count up the factors on each side, but it should weigh each factor individually against the others. Thus, one or two particularly important local contacts may outweigh a numerical majority of foreign contacts.[18] In fact, one prestigious Second Circuit opinion, *Bartholomew v. Universe Tankships, Inc.*,[19] held that "substantial contacts" were all that were needed, and that as soon as a substantial contact was found, a court should stop its deliberations and proceed to apply the Jones Act to the case before it. Judge Medina, who wrote the *Bartholomew* case, makes a persuasive argument for his "substantial contacts" theory, and given the possible vitality of the holding, it is worth exploring.

Judge Medina was fairly critical of the balancing approach of *Lauritzen v. Larsen*. He suggested that the standards set forth in that case were inherently vague and lacked a common principle of decision or method of approach. Results, he claimed, were being reached by "mere dialectic, manipulation, or guesswork."[20] Rather than balancing the various points of contact, Judge Medina undertook to restate the procedure for deciding whether the Jones Act should apply to a foreign seaman in light of the various results which had been reached in the Jones Act cases. First, he noted that the cases made it clear that "not every contact, no matter how ephemeral or fortuitous it might be, would be deemed a basis for applying . . . the Jones Act."[21] Second, he noted that no single point of contact had ever been made indispensable.[22] Third, the cases could not support a conclusion that the Jones Act should be applied only where the United States could claim the most vital connections with the transaction.[23] From these truths Judge Medina came to the following conclusions:

> Hence it must be said that in a particular case something between minimal and preponderant contacts is necessary if the Jones Act is to be applied. Thus we conclude that the test is that "substantial" contacts are necessary. And while . . . one

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application of the Jones Act. The reports are full of cases where minimal American contacts were held insufficient to warrant the application of American law. *See* Leonard v. General Carriers, S.A., 1975 C.M.A. 471 (N.D. Cal. 1974) (call on ports in United States); Frangiskatos v. Konkar Maritime Enterprises, 471 F.2d 714 (2d Cir. 1972) (branch office to handle charter agreements, insurance matters); Dassigienis v. Cosmos Carriers & Trading Corp., 442 F.2d 1016 (2d Cir. 1971) (checking account in New York); Camarias v. M/V Lady Era, 318 F. Supp. 379 (E.D. Va. 1969), *aff'd*, 432 F.2d 1234 (4th Cir. 1970) (plaintiff married to American citizen).

[17] *See* Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1392, 1396 n.21 (2d Cir. 1976).

[18] Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 308-310 (1970).

[19] 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959).

[20] 263 F.2d at 439.

[21] *Id.* at 440.

[22] *Id.*

[23] *Id.* Judge Medina noted that American seamen working for foreign vessels had been able to sue for their injuries under the Jones Act. It was beyond doubt, however, that a foreign seaman working on a vessel flying the American flag could sue his employer under the Jones Act.

> contact such as the fact that the vessel flies the American flag may alone be sufficient, this is no more than to say that in such case the contact is so obviously substantial as to render unnecessary a further probing into the facts.[24]

Judge Medina found such a formulation attractive for two reasons. First, it was a rational method for determining the difficult question of congressional intent. Second, the proposed test posed no metaphysical difficulty of weighing factors that were present against factors that were absent; for example, the fact that the injury *did* take place in American waters against the fact that the vessel did *not* fly an American flag. Instead, a judge using the *Bartholomew* test need only consider each fact or group of facts constituting an American contact with the transaction to determine whether that contact is substantial. If no single contact is substantial, the judge must then decide whether the aggregate of insubstantial contacts adds up to the necessary substantiality. No balancing at all occurs in the *Bartholomew* test.

Is there actually a difference between the *Lauritzen* and *Bartholomew* tests?[25] Although the results produced by these tests usually will be the same, the tests are conceptually different, and in the rare case where two nations have genuinely conflicting substantial interests in a mishap on the high seas, the *Bartholomew* test is more likely to uphold application of the Jones Act than is the *Lauritzen* test.[26] In such a case, a court relying on *Lauritzen* might be tempted to defer to the law of a foreign nation if such nation is found to have an interest even more substantial than the concededly substantial interest of the United States. A court relying on *Bartholomew* would simply stop its inquiry upon finding a substantial American interest.

The two cases represent two schools of thought on the subject of conflicts of law. *Lauritzen* seems to have been written with the notion in mind that only one nation should be able to apply its laws to a transaction, while *Bartholomew* seems to represent a more modern "interest analysis" approach.[27]

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[24] *Id.*

[25] For a case articulating the difference between *Lauritzen* and *Bartholomew*, *see* Shahid v. A/S Ludwig Mowinckels Rederi, 236 F. Supp. 751, 753 (S.D.N.Y. 1964).

[26] *Compare* Garis v. Cia. San Basilio, 267 F. Supp. 917 (S.D.N.Y. 1966), *aff'd*, 386 F.2d 155 (2d Cir. 1967), *with* Antypas v. Cia. San Basilio, 541 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 1098 (1977).

[27] Interest analysis as a method of resolving conflict-of-law questions involves a five-step process, according to its founder, Brainerd Currie:

> 1. Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision.
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> 2. When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy—perhaps it is helpful to say the social, economic, or administrative policy—which is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of that policy to the case at bar.

Whether *Bartholomew* is good law is a live question. The Court of Appeals for the Second Circuit said in 1964 that *Bartholomew* had been more or less overruled by *McCulloch v. Sociedad Nacional.*[28] In *McCulloch,* the Supreme Court considered whether the National Labor Relations Act should be applied to vessels with foreign crews owned by foreign subsidiaries of American corporations, and ruled that the law of the country whose flag the ship flew (the law of the Flag) should govern matters of shipboard discipline. The Second Circuit took this to mean that it should weigh American contacts against the fact of foreign registration.[29]

The Second Circuit reaffirmed its view two years later in *Tsakonitis v. Transpacific Carriers Corp.*[30] In that case, the plaintiff was a foreign seaman injured in the United States on a vessel flying the flag of Greece. The vessel was owned by a Panamanian corporation, which in turn was owned by a Greek corporation, Hellenic Lines, Ltd. Hellenic Lines was largely owned by a Greek national, Pericles Callimanopoulos. The headquarters of Hellenic Lines, however, were in New York, and Callimanopoulos, who was also general manager of Hellenic Lines, resided in Connecticut. The plaintiff sued under the Jones Act, but the trial court dismissed the claim and the Second Circuit affirmed. The language of the court was strictly balancing language: "Wherever, as here, there are various factors to be weighed for and against jurisdiction, the decision must be controlled by the more weighty . . ."[31] The court continued: "Greece certainly has enough contacts with the ship so that our courts should hesitate out of considerations of comity before applying and foisting upon it the heavy potential liabilities of the American law of American personal injuries."[32]

The latest case from the United States Supreme Court on the subject of foreign seamen in American courts, *Hellenic Lines, Ltd. v. Rhoditis,*[33] involved precisely the same fact situation as *Tsakonitis,* except that the plaintiff was injured in Louisiana. Justice Douglas, writing for the majority, came to a conclusion opposite that of the Second Circuit and quoted *Bartholomew* with approval. It is difficult, however, to determine whether Justice Douglas actually employed the *Lauritzen* or the *Bartholomew* test in reaching his conclusion.

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4. If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.

5. If the court should find that the foreign state has an interest in the application of its law and policy, it should apply the law of the forum state even though the foreign state also has such an interest, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

Currie, *The Constitution and the Choice of Law: Government Interests and the Judicial Function,* 26 U. CHI. L. REV. 9-10 (1958) (accompanying footnotes omitted).

[28]372 U.S. 10 (1963).

[29]Tjonaman v. A/S Glittre, 340 F.2d 290, 292 (2d Cir. 1965), *cert. denied,* 381 U.S. 925 (1965).

[30]368 F.2d 426 (2d Cir. 1966), *cert. denied,* 386 U.S.1007 (1967).

[31]*Id.* at 429.

[32]*Id.* at 428.

[33]398 U.S. 306 (1969).

On the one hand, Justice Douglas argued that the foreign shipowner enjoyed the protection of American laws and therefore ought to be subject to liability thereunder.[34] This language is reminiscent of the reasoning in *Bartholomew,* which looks only for a substantial reason to apply American law. On the other hand, Justice Douglas counted up the various foreign contacts and found them numerically superior but "minor weights in the scales compared with the *substantial* and *continuing* contacts that this alien owner has with this country."[35] This is clearly balancing language in the *Lauritzen* mold, but it is unclear whether Justice Douglas meant that the preponderance of the interests militated for the choice of American law, or merely that substantial contacts with the United States demand the application of the Jones Act absent any good reason why it should not be applied. It must be conceded that the Greek contacts certainly would have upheld Greek jurisdiction under the *Lauritzen* principles.[36] Justice Harlan's dissent in *Hellenic Lines v. Rhoditis* strongly criticized the majority opinion for upholding the application of the Jones Act in light of the overwhelming Greek interest in adjudicating the matter. Therefore, in spite of language suggesting a balancing approach, the case can be viewed on its facts as a classic example of interest analysis in that it applied American law even though a foreign jurisdiction had substantial contacts with the transaction.

The Court of Appeals for the Second Circuit, in *Moncada v. Lemuria Shipping Corp.,* stated flatly that *Rhoditis* expressly adopted the *Bartholomew* test:

> No subsequent decision of this court or of the Supreme Court has undercut the holding of *Bartholomew.* Indeed, in [*Rhoditis*], the Supreme Court expressly adopted the test enunciated by Judge Medina in *Bartholomew.* Whether, as appellee suggests, the dissent in *Rhoditis* might now win the support of a majority of the Supreme Court is not for us to decide.[37]

II. Points of Contact Justifying Application of the Jones Act

Having discussed as clearly as possible the nature of the various points of contact which have been used to decide Jones Act cases, it is now necessary to consider these contacts and how they are viewed by the courts.

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[34] *Id.* at 309-310.

[35] *Id.* at 310 (emphasis added).

[36] *See* Bartholomew v. Universe Tankships, Inc., *supra* note 19 at 440. Also, *see* note 68 *infra.*

[37] 491 F.2d 470 (2d Cir. 1974), *cert. denied sub nom.* Ekberg Shipping Corp. v. Moncada, 417 U.S. 947 (1974). *Accord,* Complaint of Ta Chi Navigation (Panama) Corp., 462 F. Supp. 260, 262 (S.D.N.Y. 1978); Rode v. Sedco, Inc., 394 F. Supp. 206, 210 (E.D. Tex. 1975). In DeMateos v. Texaco, Inc., 562 F.2d 895 (3rd Cir. 1977), *cert. denied,* 435 U.S. 904 (1978), the adoption of *Bartholomew* by *Rhoditis* was rejected as contrary to due process standards. *See* text at notes 116-21 *infra.*

Lauritzen v. Larsen listed seven such points of contact:

the place of the wrongful act;
the place where the contract of employment was made;
the inaccessibility of a foreign forum;
the law of the forum;
the law of the flag;
the allegiance of domicile of the injured seaman;
the allegiance of the defendant shipowner.[38]

To these, *Hellenic Lines, Ltd. v. Rhoditis* added:

(8) The place of the shipowner's base of operations.[39]

Of these eight factors, the first four have been dismissed as unimportant in influencing litigation. Although there is occasional language suggesting that the presence of one of these factors might make the extra difference in a close case, it is hard to justify why this should be so. The chief fault shared by these four lesser contacts is that they are fortuitous and do not properly reflect the interests nations have in any given maritime transaction. For instance, given the highly mobile nature of the maritime business, the fact that a seaman signed his articles in any given port is a matter of mere chance. As Justice Jackson said in *Lauritzen*:

> A seaman takes his employment, like his fun, where he finds it; a ship takes on crew in any port where it needs them. The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that best take care of their seamen.[40]

The forum in which a seaman brings his action also is likely to be the result of a fortuitous, if not self-servingly calculated, choice.[41] The place of the wrongful act also is a matter of chance in the maritime business. Too many jurisdictions are traversed by a vessel in any given voyage to make the place of the wrong an effective way to choose the proper law to apply to a given tort.[42]

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[38] 345 U.S. at 583.

[39] ". . . and there may be others." Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970). *See, e.g.*, Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320, 322 (S.D.N.Y. 1962) (plaintiff signed a contract naming the law of Greece as applicable).

[40] 345 U.S. at 571. The Court also notes that while the place of contract might be important for a choice of law problem involving a contract dispute, it is of little use in deciding a tort question. *See also* Romero v. International Terminal Co., 358 U.S. 354, 383 (1959). Seamen often sign articles which stipulate that the law of a particular nation shall apply to any personal injuries, but these clauses are ignored where there is reason to apply the Jones Act. Pandazopoulos v. Universal Cruise Lines, Inc., 365 F. Supp. 208, 211 (S.D.N.Y. 1973); *compare* Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320, 322 (S.D.N.Y. 1962) (stipulated choice of law given some weight in the *Lauritzen* balancing test); Voyiatzis v. National Shipping & Trading Corp., 199 F. Supp. 920, 925 (S.D.N.Y. 1961).

[41] 345 U.S. at 588. As to when a seaman, in his articles, stipulates which law should apply to his personal injuries, *see* cases cited in note 40 *supra*.

[42] *Id.* at 583-84; Romero v. International Terminal Co., 358 U.S. 354, 384 (1959); Conte v. Flota Mercante del Estado, 277 F.2d 664 (2d Cir. 1960); Berendson v. Rederiaktiebolaget Volo, 257 F.2d 136 (2d Cir.), *cert. denied*, 358 U.S. 895 (1958); The Fletero v. Arias, 206 F. Supp. 835

The argument has been made, however, that this factor ought to be important when the injury causes the seaman to be cast onto the public resources of a community in the United States.[43] It also should be true that where the business of the vessel is completely within a single jurisdiction, the place of the injury thereby becomes a matter worthy of consideration.[44] As for inaccessibility of a foreign forum, the United States Supreme Court has made it clear that while such a factor is influential when an admiralty court decides whether it should keep jurisdiction over claims between foreigners, it is irrelevant in deciding whether United States law should be applied to that claim.[45] Simple inaccessibility of a foreign forum is, properly speaking, no point of contact with United States interests at all.

The remaining points of contact have been more influential in determining the issue of Jones Act applicability and, therefore, they deserve to be treated in more detail.

III. Allegiance of the Seaman

The allegiance of the plaintiff seaman was purported to be an important factor in deciding whether to apply the Jones Act in *Lauritzen v. Larsen.*[46] The ancient rule, it was said, automatically attributed the nationality of the vessel to the crew. But while "during service under a foreign flag some duty of allegiance is due," the Court acknowledged that "each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support."[47] Thus, in *Uravic v. F. Jarka Co.,*[48] the plaintiff's American citizenship was considered a major persuasive factor in supporting the applicability of the Jones Act. The facts in that case were unique to the times, however, and not particularly good authority for the proposition that the seaman's nationality is an important factor in a choice of law context.[49] Much better authority for the proposition that American citizenship is an important factor in favor of applying the Jones Act is *Gambera*

(E.D. Pa. 1960), *aff'd,* 288 F.2d 437 (3rd Cir. 1961). *But compare* Gambera v. Bergoty, 132 F.2d 414 (2d Cir. 1942), *with* O'Neill v. Cunard White Star, 160 F.2d 446 (2d Cir. 1947). *See also* Kyriakos v. Goulandris, 151 F.2d 132 (2d Cir. 1945) (plaintiff recovered under the Jones Act upon showing of place of tort and place of contract). Cases prior to *Lauritzen* probably should be considered questionable authority on this score.

[43]Currie, *The Silver Oar and All That: A Study of the* Romero *Case,* 27 U. CHI. L. REV. 1, 65-75 (1959). *See also* Watson v. Employers' Liability Assurance Corp., 348 U.S. 66, 72-73 (1954). *But see* Pertichino v. Meridional Pesca Degiosa, 444 F. Supp. 190 (S.D.N.Y. 1978).

[44]Alvarez v. Creole Petroleum Corp., 462 F. Supp. 782, 787 (D. Del. 1978).

[45]345 U.S. at 589-90.

[46]*Id.* at 586.

[47]*Id.*

[48]282 U.S. 237 (1931).

[49]In *Uravic, id.,* plaintiff's decedent was a longshoreman working for an American stevedoring company. During work on a German ship, plaintiff's decedent was killed. Plaintiff was able to sue under the Jones Act because the accident occurred before the passage of the

v. Bergoty.[50] That case involved a foreign seaman, but the seaman was a long-term American resident. Injured in the United States on a vessel flying a foreign flag, the seaman was allowed to recover under the Jones Act. While alien seamen on alien ships generally could not expect Jones Act protection, the court said:

> The case at bar was not of that sort. Not only had the libellant been domiciled in the United States for over 20 years . . . but the voyage began and ended in the United States. . . . The whole voyage was thus to be performed within our territorial waters. . . . That presents a wholly different situation from any that have hitherto arisen.[51]

Courts are prepared to go the other way when no contact other than American citizenship or residence of the plaintiff is present. In *O'Neill v. Cunard White Star*[52] and *Smith v. Furness Withy & Co.*,[53] relief was denied where the only American contact was the residence of the plaintiff. Thus, if *Gambera,* a pre-*Lauritzen* case, can still be considered good authority, two principles can be drawn from it. First, American residence of a foreign seaman is just as potent a local contact as is American citizenship. And second, an American resident or citizen cannot expect to recover from his foreign employer unless another local contact is present. The American resident suing the foreign employer, then, may be one of the few situations where such insignificant contact points as "place-of-the-injury" are influential. This conclusion certainly is bolstered by the presence of language in *Uravic* emphasizing that the plaintiff was injured in an American port.[54]

If American citizenship or residence is a point of contact favoring application of the Jones Act, foreign citizenship or residence ought to weigh against its application.[55] Under the *Bartholomew* formulation, of course, this and any other point of contact favoring foreign law are irrelevant in the face of

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Longshoremen's and Harbor Worker's Compensation Act in 1927 and after the Supreme Court's opinion in *International Stevedoring Co. v. Haverty,* 272 U.S. 50 (1926). Defendant claimed that because, under *Haverty,* plaintiff's decedent was a seaman *pro hac vice,* and because, under the ancient rule, the nationality of the flag was attributed to the seamen aboard the vessel, plaintiff's decedent should be considered a German national. On these narrow facts, the Court ruled:

> There is strong reason for giving the same protection to the person of those who work in our harbors when they are working upon a German ship that they would receive when working upon an American ship in the next dock, as is especially obvious in the case of stevedores who may be employed in unloading the vessels of half a dozen different flags in turn.

282 U.S. at 238-39. *Compare* Lemonis v. Prudential-Grace Lines, Inc., 81 Misc. 2d 614, 366 N.Y.S.2d 541 (1975).

[50] 132 F.2d 414 (2d Cir. 1942).

[51] *Id.* at 415-16.

[52] 160 F.2d 446 (2d Cir. 1947).

[53] 119 F. Supp. 369 (S.D.N.Y. 1953).

[54] *See* note 49 *supra.*

[55] In Pandazopoulos v. Universal Cruise Lines, Inc., 365 F. Supp. 208, 211 (S.D.N.Y. 1973), allegiance of plaintiff to Greece was said to weigh against application of the Jones Act but was not determinative of the issue. The fact that the choice was between Panamanian and United States law reduced its significance.

established United States interests embodied in other contact points. Thus, in *Rhoditis,* the plaintiff's foreign citizenship was dismissed as a "minor weight in the scales" in comparison with the defendant's United States contacts.[56]

The dissent in *Rhoditis* by Justice Harlan takes a unique position on the importance of the plaintiff's foreign citizenship in determining whether to apply the Jones Act; it would end the access to United States courts that foreign seamen now enjoy. The membership of the Supreme Court has changed drastically since the *Rhoditis* opinion was handed down in 1970 however. Therefore, the view of Justice Harlan ought to be examined, because it may be that some future majority of the Court may yet adopt it.[57]

Justice Harlan begins his dissent by citing *McCulloch v. Sociedad Nacional,* a case dealing with the National Labor Relations Act as applied to foreign crews of foreign vessels,[58] and *Lauritzen* for the proposition that the nationality of the ship's flag was such an important contact point with a foreign nation that it must "overbear most other connecting events in determining applicable law . . . unless some heavy counterweight appears."[59] "Such a counterweight would exist," argued Justice Harlan, "only in circumstances where the application of the American rule of law would further the purpose of Congress."[60] Of necessity, some legislation had to reach beyond the United States' borders, but this was not necessarily the case with regard to an act providing personal injury remedies. Justice Harlan continued:

> The only justification that I can see for extending extraterritorially a remedial-type provision like [the Jones Act] is that the injured seaman is an individual whose well-being is a concern of this country. It was for this reason that Lauritzen recognized the residence of the plaintiff as a factor that should properly be considered in deciding who is a "seaman" as Congress employed that term in [the Jones Act].[61]

He then proposed the following rule:

> When, as in the case before us, the injured plaintiff has no American ties, the inquiry should be directed toward determining what jurisdiction is primarily concerned with plaintiff's welfare and whether that jurisdiction's rule may, consistent with those notions of due process that [require minimum contacts with that jurisdiction], govern recovery.[62]

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[56]398 U.S. at 310.

[57]*See* Moncada v. Lemuria Shipping Corp., 491 F.2d 470, 472 (2d Cir.), *cert. denied sub nom.* Ekberg Shipping Corp. v. Moncada, 417 U.S. 947 (1974).

[58]372 U.S. 10 (1963). In *McCulloch,* which upheld foreign law over United States law to govern labor disputes among the ship's crew, Justice Clark was careful to point out that the holding of the case might not apply to Jones Act cases, because personal injury controversies might not involve internal disciplinary matters. In that regard, *compare* Pandazopoulos v. Universal Cruise Lines, Inc., 365 F. Supp. 208 (S.D.N.Y. 1973), with Bassis v. Universal Lines, S.A., 322 F. Supp. 449 (S.D.N.Y.), *aff'd,* 436 F.2d 64 (2d Cir. 1970).

[59]345 U.S. at 586 (1953).

[60]398 U.S. at 313 (dissent).

[61]*Id.* at 313-14.

[62]*Id.* at 318.

Thus, Justice Harlan presumably would limit application of the Jones Act only to those seamen whose welfare is the concern of the United States, and even then only to those cases in which application of American law is justified by a showing of "minimum contacts" with the transaction. The problem with looking only at the nationality of the plaintiff seaman is that Justice Harlan ignores the foreign seaman on an American vessel. His thesis would seem to govern these cases as well, and by doing so, the thesis contradicts the very rule, law of the flag, which he earlier asserted was supreme. It is beyond question that courts must apply American law to the claims of foreign seamen injured on vessels flying the American flag.[63] It is probably more fair to read Justice Harlan's view as limited by the facts of *Rhoditis*: a foreign seaman serving on a genuinely foreign vessel. As to flags of convenience, surely Justice Harlan would have conceded that an American vessel owner should not escape the burdens of United States law by the simple and common device of foreign registration. Language in Justice Harlan's dissenting opinion indicates that he would have approved the application of United States law to United States citizens and corporations, even when a foreign seaman is the plaintiff in a Jones Act action.[64]

IV. The Law of the Flag, Allegiance of the Defendant Shipowner, and Defendant's Base of Operations

The last three points of contact, the most important of the eight examined herein, will be considered together, as they present three ways of ascertaining the same thing: is the Jones Act defendant sufficiently American to justify application of United States law to its affairs? It is a principle universally agreed upon that a nation ought to be able to govern the conduct of its

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[63] Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 440 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959).

[64] Justice Harlan complained that the majority in *Rhoditis* was taking the principle of piercing the convenient registration of a vessel too far and that, in fact, the offending vessel involved in the case was very much a Greek vessel, not an American one. Harlan noted that the "anti-convenient flag" language of *Lauritzen* was preceded by citations to two cases in which American law was applied to govern the conduct of Americans abroad: "In both cases the application of domestic law presupposed or construed legislative purpose to be furthered by reaching across the border." 398 U.S. at 315-16. Thus, unless Justice Harlan would say that Congress had no intention of holding United States vessels to the Jones Act, he would have to say at least that the Jones Act must apply to the personal injury claims when foreign seamen are working aboard *American* vessels. Otherwise, corporations engaging in foreign registration would gain a competitive advantage over corporations flying a United States flag. *See* International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926): "[T]he policy of the [Jones Act] is directed to . . . treating compensation for injuries to [seamen] as properly part of the cost of doing business." This is a principle of which Justice Harlan ought to approve, even though he put no stock in the claim that Hellenic Lines, a genuinely foreign corporation, should not get a competitive advantage over United States shipowners.

nationals and that if the United States wishes to impose upon an American vessel the duty to compensate foreign nationals for their injuries, it can do so consistently with international comity.[65]

The easiest way to identify a ship as American is by its flag. The United States has very strict rules emphasizing American ownership and control, as to which vessels can register under the United States' laws.[66] Application of the Jones Act to any seaman aboard a vessel flying an American flag is beyond doubt.[67] Some courts have said that a defendant owning a vessel registered in this country is estopped from claiming that United States law should not apply to its affairs.[68]

Although United States registration ends all dispute as to the application of the Jones Act, foreign registration does not necessarily have the concomitant opposite effect. Some older cases have allowed American seamen or foreign seamen residing in the United States to recover against foreign shipowners,[69] but these cases, predating *Lauritzen,* cannot be cited with a great deal of confidence. Nevertheless, no case stands to the contrary. Also, United States courts are more likely to ignore "flags of convenience" and even genuine flags if it is fair to say the vessel is owned or controlled by Americans, or is operated from headquarters in the United States.

Lower courts have been encouraged in this practice by language in *Lauritzen v. Larsen,* where Justice Jackson said:

> But it is common knowledge that in recent years a practice has grown, particularly among American shipowners to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners, the obligations which our law places on them.[70]

This willingness to look beyond the substance of the vessel's registration to determine its "true nationality" has been extended to a willingness to look beyond foreign incorporation of a company created by American owners to make it seem as if the vessel is owned by foreigners. Thus, in *Bartholomew,* the defendant vessel flew the flag of Liberia and was owned by a Liberian corporation. All of the stock of the Liberian corporation was held by a Pana-

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[65] *See, e.g.,* Skiriotes v. Florida, 313 U.S. 69, 73 (1941), *quoted with approval in* Lauritzen v. Larsen, 345 U.S. at 587.

[66] *See* Certificate of Registries Act, 1 Stat. 288, 46 U.S.C. § 11 (1970).

[67] "Yet could there be any doubt that if the ship flew the American flag, without more, the Jones Act would apply?" Bartholomew v. Universe Tankships, Inc., *supra,* 263 F.2d at 44.

[68] Perdikouris v. S.S. Olympos, 196 F. Supp. 849, 854 (E.D. Va. 1961). *See also* Rainbow Line, Inc. v. M/V Tequila, 480 F.2d 1024, 1027 (2nd Cir. 1973).

[69] Gambera v. Bergoty, note 50 *supra.*

[70] 345 U.S. at 587 (footnotes omitted). One court has gone so far as to list the flag as one of the unimportant but not quite meaningless factors in the choice of law context. *See* Koupetouris v. Konkar Intrepid Corp., 402 F. Supp. 951 (S.D.N.Y. 1975), *aff'd,* 535 F.2d 1392 (2d Cir. 1976).

manian corporation, and, in turn, all of the stock of the Panamanian corporation was owned by American citizens. In addition, all the officers of the Liberian corporation were Americans, and its principal place of business was New York City. Its Liberian office was maintained there as a mere statutory formality. On the basis of this evidence, the defendant Liberian corporation was proclaimed "American" for the purposes of the Jones Act:

> [L]ooking through the facade of foreign registration and incorporation to the American ownership behind it is now well established . . . This is essential unless the purposes of the Jones Act are to be frustrated by American shipowners intent upon evading their obligations under the law by the simple expedient of incorporating in a foreign country and registering their vessels under a foreign flag. . . . In the case now before us appellant has taken the trouble to insert an additional nominal foreign corporation between the flag and the true beneficial ownership of the vessel. But we have little difficulty in brushing all this aside when considering the applicability *vel non* of the Jones Act. Complicating the mechanics of evasive schemes cannot serve to make them more effective.[71]

Judge Medina went on to explain that the process of looking through foreign incorporation was to be distinguished from piercing the corporate veil. Such veil piercing is an equitable doctrine whereby a court ignores the corporate entity and holds the shareholders directly liable for the debts of the corporation. Here, the corporate entity is not ignored. Rather, its nationality is determined to be American by examining its true nature. Thus, in *Bartholomew,* it was the defendant Liberian corporation which was finally liable, rather than the American shareholders.

What factors, then, will lead a court to proclaim as "American" a foreign vessel or a foreign corporation owning a foreign vessel? Principally, the relevant issues are ownership and control.[72] Foreign vessels completely owned by Americans are easy cases. Courts will infer control of the vessel from its complete ownership.[73] But several cases also have asserted that even complete American ownership is not enough by itself.[74] Thus, if Americans were the

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[71]263 F.2d at 442.

[72]Cases exist asserting that unsupported allegations by plaintiff's counsel of American ownership and control will not justify the application of the Jones Act. Sfiridas v. Santa Cecelia Co., 358 F. Supp. 108, 112 (E.D. Pa. 1973); Scognamiglio v. Home Lines, Inc., 246 F. Supp. 605 (S.D.N.Y. 1965). Such statements might give rise to the notion that it is the plaintiff's responsibility to establish American contacts such that the Jones Act might be made to apply. *See, e.g.,* Xerakis v. Greek Line, Inc., 382 F. Supp. 774, 775 (E.D. Pa. 1974). On the theory that the burden of proof should normally follow the burden of pleading, it should be reiterated that a plaintiff states a cause of action without alleging sufficient American contacts. "A cause of action under our law was asserted here." Lauritzen v. Larsen, *supra,* 345 U.S. at 575. *See* note 10 and accompanying text *supra.*

[73]Pandazopoulos v. Universal Lines, Inc., 265 F. Supp. 208 (S.D.N.Y. 1973). *See also* Groves v. Universe Tankships, Inc., 308 F. Supp. 826 (S.D.N.Y. 1970); Voyiatzis v. National Shipping & Trading Corp., 193 F. Supp. 920 (S.D.N.Y. 1961) (control by defendant not mentioned); Rodriguez v. Solar Shipping, Ltd., 169 F. Supp. 79 (S.D.N.Y. 1958); Bobolakis v. Compania Panamena Maritima San Gerissimo, 168 F. Supp. 236 (S.D.N.Y. 1958). *Contra,* Mpampouros v. Steamship Auromar, 203 F. Supp. 944 (D. Md. 1962). The *Mpampouros* case stands alone in holding that American ownership and control, without more, is not a sufficient contact with the United States.

[74]DeMateos v. Texaco, Inc., 562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978),

beneficial owners of a vessel, but foreign interests were in control as trustees, the Jones Act, according to these cases, could not apply.

Judge Medina, in *Bartholomew* termed "in doubt" the cases which hold that ownership alone is not enough,[75] and if the case retains its vitality, a mere showing of American ownership may suffice. As one judge aptly pointed out, American business affairs generally are organized around democratic principles, and if an American owns a majority of shares in a corporation, it should be presumed, in the absence of a contrary showing, that he is in control of the vessel and that it should be considered American.[76] Also, minority American ownership will be considered sufficient local contact to warrant the application of the Jones Act if that minority percentage of ownership is coupled with control of the corporation which owns the vessel.[77] Thus, evidence of such control might include a showing that Americans dominate the board of directors or the staff of officers,[78] the inference being that American interests put them there. The mere fact that an American has been hired to manage a foreign corporation, however, is not itself enough to establish American control.[79]

The *Rhoditis* decision added the notion that a vessel was American if its base of operations was in the United States. It will be recalled that the *Gambera* decision established that whether the plaintiff seaman was an American citizen or a foreign citizen with American residence, his contact with the United States was equally potent.[80] *Rhoditis* applied this principle to the defendant so that whether the corporation is American by "citizenship" or its corporate equivalent, or merely by the corporate equivalent of "residence," the Jones Act will be made to apply. The "base of operations" theory thus is very close to the "American control" theory. If the vessel is

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discussed in text accompanying notes 116-21 *infra.*; Moutzouris v. National Shipping & Trading Co., 194 F. Supp. 468 (S.D.N.Y. 1961) (control alone would be enough, but ownership alone is insufficient, in spite of *Bartholomew* dicta); Mproumeriotis v. Seacrest Shipping Co., 149 F. Supp. 265 (S.D.N.Y. 1957); Argyros v. Polar Compania de Navigacion, 146 F. Supp. 624 (S.D.N.Y. 1956). One case that is cited as holding that ownership alone sufficient is Bobolakis v. Compania Panamena Maritima San Gerissimo, 168 F. Supp. 236 (S.D.N.Y. 1958). *See also* Moncada v. Lemuria Shipping Co., 491 F.2d 470, 473 (2d Cir. 1974), *cert. denied sub nom.* Ekberg v. Moncada, 417 U.S. 947 (1974). It should be noted that in *Bobolakis,* control was alleged and inferred, so that statements on the sufficiency of ownership are dicta at best.

[75]263 F.2d at 443 n.4. *Accord,* Moncada v. Lemuria Shipping Co., 491 F.2d 470, 473 (2d Cir. 1974), *cert. denied sub nom.* Ekberg v. Moncada, 417 U.S. 947 (1974). *Contra,* DeMateos v. Texaco, Inc., *supra,* 562 F.2d at 895.

[76]Mpampouros v. Steamship Auromar, 203 F. Supp. 944, 948 n.3 (D. Md. 1962).

[77]Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960), *cert. denied,* 365 U.S. 869 (1961); Complaint of Ta Chi Navigation (Panama) Corp., 462 F. Supp. 260 (S.D.N.Y. 1978); Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320, 325 (S.D.N.Y. 1962).

[78]Moncada v. Lemuria Shipping Corp., *supra,* 491 F.2d at 474; Bartholomew v. Universe Tankships, Inc. *supra,* 263 F.2d at 441. *See also* Rainbow Line, Inc. v. M/V Tequila, 480 F.2d 1024 (2d Cir. 1973).

[79]*See* Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (5th Cir. 1965).

[80]*See* notes 50-54 and accompanying text *supra.*

being directed from an American site, it will be deemed American for the purposes of the Jones Act on the theory that a foreign corporation which, by residing here, avails itself of the protection of American laws ought to assume the burdens of American laws as well.[81]

Defining what constitutes a "base of operations" in this country is not so easy, and on this particular point the case law is sparse. The presence of various agents representing foreign corporations in this country generally will not be sufficient. For instance, it is very common for foreign companies to hire husbanding agents in this country to handle provisioning and other matters when a vessel arrives. The presence of a husbanding agent is not by itself enough to warrant a finding that the base of operations is here,[82] even if the foreign corporation owns (or the shareholders of the foreign corporation own) the American corporation which serves as the husbanding agent.[83] Nor is a branch office here enough to constitute the "base of operations" if that office only handles local charter agreements and insurance matters.[84] Thus, it is apparent that the United States office which is purported to be the "base of operations" must be in actual control of the vessel.[85] At this point, it might be useful to take note of *Gomez v. Karavias U.S.A. Inc.*,[86] which held the Jones Act applicable to a foreign corporation on the ground that

> [W]hen the realities of the [defendant's] shipping operation are examined, and when the various separate corporations are looked at in relation to each other, it is apparent that the Karavias operation is world-wide, and that an important part of this operation is based in the United States.[87]

Thus, if *Gomez* is to be followed, a conclusion that is far from certain,[88] it need be shown only that defendant's operation is world-wide and that the

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[81] *See* 398 U.S. at 310.

[82] Fitzgerald v. Zim Israel Navigation Co., 1975 C.M.A. 1425 (S.D.N.Y. 1975); Dassigienis v. Cosmos Carriers & Trading Corp., 321 F. Supp. 1253 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1016 (2d Cir. 1971).

[83] Koupetouris v. Konkar Intrepid Corp., 402 F. Supp. 951 (S.D.N.Y. 1975), *aff'd*, 535 F.2d 1392 (2d Cir. 1976); Brillis v. Chandris (U.S.A.) Inc., 215 F. Supp. 520 (S.D.N.Y. 1963).

[84] Merren v. A/S Borgestad, 519 F.2d 82 (5th Cir. 1975); Frangiskatos v. Konkar Maritime Enterprises, S.A., 471 F.2d 714 (2d Cir. 1972); Hazell v. Booth S.S. Co., 444 F. Supp. 85 (S.D.N.Y. 1977); Manlugon v. A/S Facto, 419 F. Supp. 550 (S.D.N.Y. 1976); Mihalinos v. Liberian S.S. Trikala, 342 F. Supp. 1237 (S.D. Cal. 1972). *See* Hoidas v. Orion & Global Chartering Co., 440 F. Supp. 53 (S.D.N.Y. 1977) (local agent merely transmitted messages).

[85] In *Rhoditis*, the majority cited as evidence that the base of operations was in the United States the fact that many voyages started and ended in this country. 398 U.S. at 310. *See also* Moncada v. Lemuria Shipping Co., *supra*, 491 F.2d at 473; Complaint of Ta Chi Navigation (Panama) Corp. *supra*, 462 F. Supp. at 266. Whether or not this is persuasive evidence to show that the vessels are actually controlled from the United States, it is clear that starting or ending a voyage in the United States is not of itself a weighty contact with the United States. *See, e.g.*, Sammas v. The SS Jacob Verolme, 187 F. Supp. 406 (E.D. Pa. 1960).

[86] 401 F. Supp. 104 (S.D.N.Y. 1975).

[87] *Id.* at 107.

[88] *Compare* Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1392, 1396 n.21 (2d Cir. 1976).

part of the operation—in the form of subsidiaries or agents—which is in the United States is "important." Perhaps implicit in the court's holding was the fact that no other nation could claim to be the multinational corporation's headquarters, and in the absence of such a home base, United States courts would apply the Jones Act where "there are substantial relevant contacts with the United States."[89]

While the presence of agents in the United States may generally be presumed to be insufficient contact to justify application of the Jones Act, the presence of an agent hired to manage the vessel on behalf of the owner may result in a finding that the base of operations is located here. In *Pavlou v. Ocean Traders Marine Corp.*,[90] the defendant, a Liberian corporation, delegated managerial duties to a New York corporation which turned all profits back to the defendant. The New York corporation was partly owned by the same persons who partly owned the defendant corporation. The defendant corporation was forty-eight percent owned by Americans, and from this the court drew an inference that the defendant was "controlled" by Americans. But as an alternative ground for applying the Jones Act, the court noted the base of operations was in New York:

> [W]hen the mode and manner of doing business which have all the attributes of a domestic business operation, the business or corporation may become subject to the laws of this country, even though the more formal manifestations of the arrangement appear to be foreign. Of necessity, such a result follows when the situation, because of the nature of the business, involves statutory legal obligations on the part of an employer for the injuries of his or its employees. The Jones Act creates such a legal obligation. Congress enacted those statutory provisions governing certain business operations in this country to accomplish specific social objectives which were deemed advisable.[91]

Thus, when a foreign corporation delegates enough power that the vessel is actually "managed" from the United States, it may find itself subject to the Jones Act.[92]

V. Offshore Oil Drilling in Foreign Waters: A Detour into Substantive Liability

The *Pavlou* case raises an interesting dilemma for the plaintiff who wishes to sue for injuries under the Jones Act if the owner of a vessel has delegated management of the vessel to an agent of a different nationality. The problem arises from the undisputed fact that there can be only one "employer" under

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[89] *Id.*

[90] 211 F. Supp. 320 (S.D.N.Y. 1962).

[91] *Id.* at 324. *Accord,* Southern Cross Steamship Co. v. Firipis, 285 F.2d 651 (4th Cir. 1960).

[92] Complaint of Ta Chi Navigation (Panama) Corp., 462 F. Supp. 260, 265 (S.D.N.Y. 1978); *see also* Antypas v. Cia. Maritima San Basilio, 541 F.2d 307 (2d Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977). In *Antypas,* the majority also relied on the American ownership of the foreign corporation owning the vessel. The evidence of such ownership, however, was very shaky, so that delegation of control to an American corporation should be considered the basis of the result. 541 F.2d at 310. *See also* the dissenting opinion in *Antypas,* 541 F.2d at 310-11.

the Jones Act, a principal established in *Cosmopolitan Co. v. McAllister.*[93] A plaintiff may find that the existence and nature of liability shifts depending upon the circumstances of the injury.

This problem can arise in the context of American oil drilling ventures in foreign waters, such as those now in the North Sea. A common arrangement in such ventures is for an oil company to subcontract construction work to other companies in order to construct either fixed or floating oil drilling rigs. Since construction of the oil rigs is undertaken far from United States labor markets, foreign subcontractors sometimes supply foreign laborers for work directly on the oil rig or sometimes on adjoining foreign flag vessels owned and operated by the subcontractors. The situation can give rise to a variety of liability and choice of law problems.

A peculiar consideration relevant to the offshore oil industry is whether the oil rig is a "vessel." If it is not, the Jones Act cannot apply.[94] Movable oil rigs certainly qualify as vessels.[95] Fixed installations off the coast of the United States, however, are treated as land under the Outer Continental Shelf Lands Act.[96] In *Rodrique v. Aetna Cas. Co.,*[97] the Supreme Court seemed to indicate that no fixed installation is *ever* a vessel within the maritime jurisdiction.[98] As to fixed installations off the shore of foreign lands, it would seem (although it has not been decided) that land-based choice of law principles and land-based liability provisions will govern any injury occurring thereon. It may also be the case that barges tied to fixed oil platforms are not "vessels" either. Even if the barge is movable from time to time, it may be considered part of the fixed oil platform, unless constructed for the purpose of navigation apart from those movements.[99] The cases establishing this rule involved rafts tied to piers in domestic waters. Application of this rule to a raft or barge tied to a fixed oil platform is questionable, since operations are conducted on the high seas. In addition, long towing operations are required to put these barges in place; therefore, they can easily be characterized as "vessels in navigation."

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[93]337 U.S. 783 (1949). "We have no doubt that, under the Jones Act, only one person, firm or corporation can be sued as employer." 337 U.S. at 791. *See also* Moragne v. States Marine Lines, Inc., 398 U.S. 379, 394 (1970); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 170 (2d Cir. 1972). *Mahramas* held specifically that the employer need not be a vessel owner for the Jones Act to apply. 475 F.2d at 165.

[94]Under the Jones Act, a plaintiff must be a member of a "crew" on a "vessel." Senko v. Lacrosse Dredging Corp., 352 U.S. 370, 371 (1955).

[95]Cook v. Belden Concrete Products, Inc., 472 F.2d 999,1001 (5th Cir.), *cert. denied,* 414 U.S. 868 (1973).; Offshore Oil Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

[96]The Tidelands Act, 67 Stat. 462, 43 U.S.C. § 1331 *et seq.* (1953); Rodrigue v. Aetna Cas. Co., 395 U.S. 352 (1969).

[97]395 U.S. 352 (1969).

[98]*Id.* at 360, 366. *See also* The Poughkeepsie, 162 F. 494 (S.D.N.Y. 1908), *aff'd sub nom.* The Phoenix Construction Co. v. The Steamer Poughkeepsie, 212 U.S. 558 (1908) (fixed platform in a river with piping system to supply drinking water to a nearby town was not a vessel).

[99]Cook v. Belden Concrete Products, Inc., 472 F.2d 999, 1002 (5th Cir), *cert. denied,* 414 U.S. 868 (1973). *See also* Powers v. Bethlehem Steel Corp., 477 U.S. 643 (1st Cir. 1973), *cert. denied,* 414 U.S. 856 (1973).

Assuming that "vessels" are implicated in the injury, it becomes very important to determine whether the vessel owner or its subcontractor is the Jones Act employer of the injured plaintiff. The indicia of this relationship may be disposed of briefly because they are no different from the indicia present in other areas of the law. The word "employer" in the Jones Act is to be given its common meaning,[100] and the common law may serve as a source of guidance in defining the term.[101] The most important factor in determining whether the vessel owner or the independent contractor is the employer is "control" over the plaintiff seaman. Evidence of such control includes: who issues the orders obeyed by the seaman;[102] who employs the master of the vessel on which the seaman works; who hired the seaman;[103] who pays him;[104] and who controls the route followed by the vessel.[105] The characterization adopted in the contracts between the various parties, although not decisive,[106] is no doubt significant.

With this background, it can be seen that the liability and choice of law rules applicable to the vessel owner and to the subcontractor become an elaborate matrix which nevertheless poses little chance for American companies to escape liability altogether. If United States law applies to the vessel owner which hires a truly foreign subcontractor, the vessel owner by no means escapes liability if it is not the Jones Act employer. Even if the American vessel owner is *not* the employer, it may be liable to the injured seaman under two other maritime theories. First, it will be liable if its negligence or the negligence of its servants caused the injury.[107] Second, if the injury was caused by the unseaworthiness of the vessel, the owner will be liable to the injured seaman, because the warranty of seaworthiness runs to certain business invitees who are present aboard the vessel.[108] In fact, if ancient longshoremen's law is to be taken at face value, the warranty of seaworthiness includes a warranty that the employer of the injured seaman will not

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[100]Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783, 791 (1949); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 171 (2d Cir. 1973).

[101]*See* Caldarola v. Eckert, 332 U.S. 155 (1947) (state law used to determine whether a general agent had "control" over a vessel and therefore was responsible for its seaworthiness).

[102]Cosmopolitan Shipping Co. v. McAllister, *supra*, 337 U.S. at 795.

[103]*Id.* In *McAllister*, the act of hiring is considered significant, although as the facts unfold in the opinion, it becomes apparent that the general agent actually did the hiring on behalf of the Jones Act employer. *See also* Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 171 n.9 (2d Cir. 1973) ("signing ships articles makes a seaman subject to the rules and discipline of the ship, but this does not make him the ship's employee . . .").

[104]337 U.S. at 795.

[105]*Id.*

[106]*Id.*

[107]Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959) (duty of care owed "to all who are on board for purposes not inimical to [the vessel owner's] legitimate interests").

[108]Seas Shipping Co. v. Sieracki, 328 U.S. 85, 95 (1946) (warranty runs to all "who perform the ship's service . . . with his consent or by his arrangement"); Mahramas v. American Export Isbrandtsen Lines, Inc., 475 F.2d 165, 169 (2d Cir. 1973).

introduce any element of unseaworthiness into the vessel. This in effect makes the vessel owner liable for injuries caused by the subcontractor, whether or not the subcontractor was negligent in causing an unseaworthy condition.[109] Thus, it would appear that, as long as the injury occurs on the vessel,[110] no reduction in liability whatsoever exists for the American vessel owner which hires a foreign subcontractor, except that if the defendant is not the Jones Act employer, some significant eccentrities of the Act would be avoided. For instance, the proximate cause and agency rules for the maritime theories are the familiar common law standards, while the Jones Act rules are considerably more liberal.[111]

The situation is better for the foreign vessel owner hiring an American independent contractor. If the foreign vessel owner is the employer, the Jones

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[109]Petterson v. Alaska S.S. Co., 205 F.2d 478 (9th Cir. 1953), *aff'd*, 347 U.S. 396 (1954). The *Petterson* case was a key link in the contorted subversion of the Longshoreman's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C. §§ 901-950 (1927) [hereinafter LHCA]. The LHCA had been passed to supplement International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), which held that a longshoreman could sue his employer under the Jones Act because longshoremen were seamen *pro hoc vice*. Under the LHCA, a compensation system unrelated to fault was instituted, but it was not favored by longshoremen because it was less generous than a suit under the Jones Act. In Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), the United States Supreme Court held that vessel owners warranted the seaworthiness of their vessels to longshoremen and other business invitees. In the *Petterson* case, the Supreme Court seemed to be saying that the warranty of seaworthiness was nondelegable and that the vessel owner was responsible for unseaworthy conditions introduced onto the vessel by the longshoreman's employer. Finally, in a series of cases that ended with Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960), the concept of unseaworthiness was expanded to cover the most transitory conditions posing a danger to seamen. Only pure operating negligence pertaining to the use of nondefective equipment seems to be exempt from its scope. Usner v. Luckenbach Overseas Corp., 400 U.S. 484 (1971). Meanwhile, the vessel owner was permitted indemnity from the longshoreman's employer if the latter was at fault. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co., 350 U.S. 124 (1955). For a discussion of the scope of the unseaworthiness remedy, *see* GILMORE & BLACK, THE LAW OF ADMIRALTY, 383-404 (2d ed. 1975).

In 1972, Congress amended the LHCA to bar unseaworthiness actions against vessel owners. *See generally* Note, *The Injured Longshoreman vs. The Shipowner After 1972: Business Invitees, Land-Based Standards, and Assumption of Risk*, 28 HASTINGS L.J. 771 (1977). The LHCA applies only to harbor workers, however. 33 U.S.C. § 902(3), 903(a). Members of crews are expressly exempt. 33 U.S.C. § 902(3). As to the latter, *Sieracki, Petterson* and the like should still be applicable.

[110]The warranty of seaworthiness pertains only to the effects of the vessel, so that injuries away from the vessel probably cannot be made out to be violations of the warranty. *See* Gutierrez v. Waterman S.S. Co., 373 U.S. 206 (1963) (longshoreman injured on dock after slipping on loose coffee beans unloaded from the vessel). *Compare* Garrett v. United States Lines, Inc., 574 F.2d 997 (9th Cir. 1978) ("[T]he unseaworthiness of a Navy launch ferrying a seaman to shore from his employer's ship does not render the ship unseaworthy"). A Jones Act action can result from an injury far from the vessel, as long as the requisite negligence attributable to the employer is present. Hopson v. Texaco, Inc., 383 U.S. 262 (1966) (taxi accident in Trinidad); O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). In addition, under the Jones Act very liberal rules pertain to the definition of the employer's agents for whose negligence the employer is liable. Sinkler v. Missouri Pac. R. Co., 356 U.S. 326 (1958). In *Hopson, supra*, the taxi driver's negligence was imputed to the vessel owner for the purposes of the Jones Act.

[111]"Under [the Jones Act] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." Ferguson v. Moore-McCormack Lines, Inc.,

Act does not apply unless a substantial contact with the United States justifies the application of American law. Hiring an American general agent may constitute "substantial contact" if the American agent "manages" the vessel, since such management may establish an American "base of operations" under the *Rhoditis* case.[112] It would seem to be reasonable, however, that the mere American citizenship of the managing agent is not enough to establish an American "base of operations," because an American citizen could perform his managerial functions from a foreign country. In such a circumstance, no substantial contact with the United States should exist.[113] In the case of an agent playing a nonmanagerial role, as with construction subcontractors, no substantial contact with the United States would exist. Vessels calling upon American ports and using American longshoremen or husbandmen do not subject themselves to United States law.[114] It follows, therefore, that a foreign oil company or other foreign vessel owner would not become subject to American law if American subcontractors worked on the oil drilling rig on the high seas.

If the foreign vessel owner is not subject to the Jones Act because it is not the plaintiff's employer, neither can it be sued under the maritime negligence and unseaworthiness theories, at least as those theories exist in United States law, because United States maritime law is held to apply to foreigners on the same basis as the Jones Act. These maritime theories therefore depend upon the existence of substantial contacts with the United States.[115] Thus, absent the requisite contacts with the United States, the foreign vessel's status as employer *vel non* makes no difference to its liability to an injured seaman under United States law. It may, of course, make a great deal of difference to its liability under foreign law if the American court decides to retain jurisdiction over the dispute.

Thus, the existence of a managing agent, such as the one in *Pavlou,* or any independent contractor, raises interesting issues of Jones Act liability, because one or the other is to be deemed the injured seaman's employer. The only impact on the choice of law area is whether the presence of an American agent of a foreign vessel owner constitutes a substantial contact with the United States, so that a foreign vessel owner is subject to American law.

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352 U.S. 521 (1957). *See also* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959). The Jones Act agency rules are described in note 110 *supra.*

[112] *See* Pavlou v. Ocean Traders Marine Corp., 211 F. Supp. 320 (S.D.N.Y. 1962). *Also see* text accompanying notes 90-92 *supra.*

[113] *See* Turner v. Jack Tar Grand Bahama, Ltd., 353 F.2d 954 (5th Cir. 1965). *See* text accompanying note 79 *supra. See also* Rush v. Savchuk, 48 U.S.L.W. 4088 (1980).

[114] *See* text accompanying notes 82-85, *supra.* Such contracts can be used as evidence that the base of operations is in the United States, though, even if the contracts by themselves are insufficient. Hellenic Lines, Ltd. v. Rhoditis, *supra,* 398 U.S. at 310 (1970); Moncada v. Lemuria Shipping Co., *supra,* 491 F.2d at 473.

[115] *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 382 (1959); Complaint of Ta Chi Navigation (Panama) Corp., 462 F. Supp. 260 (S.D.N.Y. 1978).

VI. Is *Lauritzen* a Constitutional Case?

A decision starkly contrary to the whole *Bartholomew* line of cases is *DeMateos v. Texaco, Inc.*,[116] in which American ownership of a foreign subsidiary was the only contact with the United States. All other contacts—flag, domicile of the plaintiff and immediate owner of the vessel, place the plaintiff signed articles, accessibility of a foreign forum and base of operations of the vessel—pointed away from application of American law.[117] The court refused to apply the Jones Act, analogizing the plaintiff's argument to an attempt to impose American law upon the "relations between Texpan and its employees in its Panamanian gasoline stations because its stock was owned by a multinational business enterprise incorporated in Delaware."[118] Application of the Jones Act, according to the court, was "a variety of 'social jingoism, which presumes that the "liberal purposes" of American law must be exported to wherever our multinational corporations are permitted to do business.'"[119]

The *DeMateos* court, then, lines up in favor of the balancing test in *Lauritzen,* equating application of United States law—mandated by the *Bartholomew* test of substantial contacts—with social jingoism. The case is more notable, however, for its discussion of the due process clause of the Fifth Amendment. According to the *DeMateos* court, the due process clause "places bounds upon congressional efforts to apply American rules of decision to transactions in which the United States has no sufficient interest."[120]

For this reason, the *DeMateos* court criticized not only *Bartholomew* but also the Supreme Court majority in *Rhoditis* for propagating a test which might run afoul of the due process clause:

> With deference both to Justice Douglas and Judge Medina, it would seem that the underlying purpose for identifying and weighing factors is not to effectuate the liberal purposes of the Jones Act, but to determine whether in the limits of due process the Act could, and within the limits of the assumed congressional deference to the conventions of international law that Act should, be applied to the transaction in question.[121]

The constitutional point raised by the *DeMateos* court, however, is very much a bogus issue.

The connection between choice of law and the due process standard was made by the Supreme Court in *Home Insurance Co. v. Dick.*[122] There a Texas

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[116]562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).
[117]*Id.* at 902.
[118]*Id.*
[119]*Id.*
[120]*Id.* at 900.
[121]*Id.* at 901. The court immediately hereafter seems to dismiss the approval of the *Bartholomew* test in *Rhoditis* as dictum.
[122]281 U.S. 398 (1930).

resident had an insurance policy with a Mexican corporation which required a claim of loss to be filed with the corporation within a year of the loss. The Texas resident had let the year slip by and was not contractually entitled to recover under the policy. Texas law, however, forbade such terms in insurance claims, and so the Texas resident sued in Texas state court, garnisheeing debts owed to the Mexican defendant. The Texas courts found that the Texas statute should apply, but the Supreme Court declared this a violation of due process, holding that because the transactions had no contacts with Texas (except the citizenship of the plaintiff), Texas law could not apply.

The decision, it is true, holds that federal constitutional grounds exist for reversing "state court decisions for what [appear] to be conspicuously inappropriate choices of law."[123] But this standard would appear to be satisfied by the slightest of governmental interest in the dispute before it.[124] By its very formulation, the "substantial contacts" doctrine of *Bartholomew* exceeds the minimal requirements of due process so that no constitutional issue could possibly exist where the *Bartholomew* standard has been met.

It should be noted that while the *DeMateos* court was of the opinion that the *Bartholomew* test was potentially violative of the due process considerations, the facts in *DeMateos* were such that due process standards clearly were met. The owner of the vessel in *DeMateos* was a corporation wholly owned by Texaco, Inc.,[125] an American citizen whose activities abroad are clearly within the federal legislative ambit.[126]

The constitutional issue in *DeMateos,* therefore, should be ignored. It presents a truism which can never arise if substantial contacts are actually present. Instead, the *DeMateos* case should be read merely as reasserting the supremacy of the *Lauritzen* balancing test over the substantial contacts test. Under the *DeMateos* line of cases, then, it can be expected that one hundred percent American ownership of the ultimate corporate entity will not by itself establish the applicability of the Jones Act.[127]

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[123]GOODRICH & SCALES, CONFLICTS OF LAWS 22 (1964).

[124]Clay v. Sun Insurance Office, Ltd., 377 U.S. 179 (1964); Watson v. Employers Liability Corp., 348 U.S. 66 (1954).

[125]DeMateos v. Texaco Panama, Inc., 417 F. Supp. 411, 415 (E.D. Pa. 1976), *aff'd,* 562 F.2d 895 (3d Cir. 1977), *cert. denied,* 435 U.S. 904 (1978).

[126]Skiriotes v. Florida, 313 U.S. 69 (1941); Blackmer v. United States, 284 U.S. 421, 438 (1932) ("The jurisdiction of the United States over its absent citizen, so far as the binding effect of its legislation is concerned, is a jurisdiction *in personam,* as he is personally bound to take notice of the laws that are applicable to him and to obey him."); Alvarez v. Creole Petroleum Corp., 462 F. Supp. 782, 785 (D. Del. 1978) (ultimate one hundred percent ownership by Creole, an Exxon subsidiary) ("Given the fact that Creole is a Delaware corporation, I do not doubt that Congress has the power to impose liability on it in circumstances of this kind without offending the Due Process Clause.").

[127]*See* Alvarez v. Creole Petroleum Corp., *supra,* 462 F. Supp. at 785.

Conclusion

A review of the case law makes it apparent that "the substantial contacts" theory in *Bartholomew* is generally accepted as the operative choice of law principle in Jones Act cases, except in the Third Circuit, where the balancing test set forth in *Lauritzen v. Larsen* is the operative test. Under the *Bartholomew* test the principal means for a foreign seaman to proceed under the Jones Act in a United States court is to show that the defendant shipping company is ultimately American in character. This can be done by showing American ownership or control from an American location. In spite of some indications from the United States Supreme Court that the law of the flag might be resurrected as the controlling factor, courts outside the Third Circuit seem more than willing to ignore the law of the flag if the facts show that the defendant benefits from the protection of American law.